UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Nekima Levy Armstrong, on behalf of themselves and other similarly situated individuals, Plaintiffs, vs. City of Minneapolis, et al, Defendants.	File No. 20-cv-1645 (KMM/DTS) Saint Paul, Minnesota December 9, 2020 9:35 a.m. ZOOM FOR GOVERNMENT VIDEOCONFERENCE

BEFORE THE HONORABLE SUSAN RICHARD NELSON
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

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P R O C E E D I N G S

VIA ZOOM FOR GOVERNMENT VIDEO TELECONFERENCE

THE COURT: We are here this morning in the matter of Nekima Levy Armstrong, et al, on behalf of themselves and others similarly situated, versus the City of Minneapolis, et al. This is civil file number 20-1645. Let's take appearances and we'll begin with the plaintiffs, please.

MR. DAVIS: Good morning, Your Honor. My name is Ahmed J. Davis. I'm from the law firm of Fish & Richardson. I'm in Washington, DC, and I'm here on behalf of the plaintiffs. With me from my law firm is my colleague Excylyn Hardin-Smith who will also be sharing in the argument with me today, and my colleague Veena Tripathi. Also on behalf of plaintiffs on the Zoom but who will not be arguing are Teresa Nelson and Isabella Nascimento on behalf of the ACLU.

THE COURT: Very good. Thank you and good morning.

Let's turn then to counsel for Lieutenant Kroll.

MR. KELLY: Good morning, Your Honor. Joseph Kelly, K-e-l-l-y, on behalf of Robert Kroll.

THE COURT: Very good. And counsel for the City of Minneapolis and Chief of Police Arradondo.

MS. SARFF: Good morning, Your Honor. This is

Kristin Sarff with the Minneapolis City Attorney's Office. I will be arguing today. My colleagues Sharda Enslin and Heather Robertson are also appearing.

THE COURT: Very good. Thank you.

And for the State defendants, please.

MR. WEINER: Good morning, Your Honor. Joe Weiner, Assistant Attorney General, on behalf of Commissioner John Harrington and Colonel Matt Langer, the State defendants.

THE COURT: Very good. Now, we're here to consider three motions. We have a motion to dismiss filed by Lieutenant Robert Kroll; a motion to dismiss the amended complaint filed by the State defendants; and by the State defendants I do mean Public Safety Commissioner John Harrington and Minnesota State Patrol Colonel Matthew Langer. And finally a motion to dismiss filed by the Minneapolis defendants, that is the City of Minneapolis and the chief of police, Chief of Police Arradondo.

I don't know if the parties discussed the most logical order of argument. I think I would recommend that we take the last filed motion first, that is the motion to dismiss filed by the Minneapolis defendants, and then the motion to dismiss filed by Lieutenant Kroll; and finally the motion to dismiss filed by the State defendants, unless there's an objection to proceeding in that fashion.

MR. DAVIS: No objection from -- on behalf of the plaintiffs, Your Honor. If we go in that order, the first one as to the City is the argument that's going to be handled by Ms. Hardin-Smith.

THE COURT: Very good. All right. Then we will do that and I will first entertain the motion to dismiss filed by the Minneapolis defendants. I presume that's you, Ms. Sarff.

MS. SARFF: Yes, Your Honor. Thank you.

Your Honor, following the death of George Floyd there were unprecedented protests and civil unrest in the City of Minneapolis. Hundreds, if not thousands, of people rightfully took to the streets to protest what they viewed to be excessive force by a police officer, and perhaps in the history of excessive force by a police officer.

During the unprecedented civil unrest, the plaintiffs concede that there was vandalism against property. There was property destruction. There was looting of businesses. There was a Third Precinct that was burned to the ground. And there was, of course, force used against police officers. And this was, as one other defendant identified, the largest riot that the City of Minneapolis had ever experienced.

And while that civil unrest was unprecedented, we do not individually challenge each of the named plaintiffs'

ability to seek relief against the individual Doe defendants. What we do challenge, however, Your Honor, is the unprecedented request to hold the City of Minneapolis liable for a period that the plaintiffs describe as a three-to-five-day period. By law, as a matter of law on the motion to dismiss, with the allegations taken in all inferences in favor of the plaintiffs, that is not a -- whatever amount of force was used during that time period cannot be considered continuing, widespread and persistent such that it can make out a custom or any of the other *Monell* or supervisory liability claims against the City defendants.

We have identified -- the most on point case law regarding this topic is the *Burbridge* case. That is a protest case that arose out of the *Stockley* decision in which an officer was found not guilty in a fatal shooting. Out of three days of protests with multiple incidences of pepper spraying, the court in that case decided that that time period was simply too close in time to the plaintiffs -- which occurred, of course, during that three-day period -- to be considered widespread, continuing and persistent.

And that is consistent with the standard of law announced by the United States Supreme Court that the use of force or the pattern of constitutional misconduct has to be

so longstanding as to be considered permanent and well settled. There are no cases cited by the plaintiffs that would allow this Court or would persuade the Court to find that a three-to-five-day period, punctuated by two days of no alleged misconduct, could qualify as a pattern of unconstitutional conduct.

For the same reasons -- and the plaintiffs stand essentially just on that three-to-five-day period. They of course do identify two isolated incidents in 2015. Notably, that -- those allegations do not -- do not involve instances of less lethal projectiles and accordingly they cannot be considered part of a pattern as to that type of use of force.

They do allege instances of use of chemical irritants. However, given the five-year distance between those allegations and the three-to-five-day period in 2020, that cannot be considered sufficient to essentially make up for a five-year gap. It is too distant in time to be considered a pattern.

THE COURT: Ms. Sarff, let me just interrupt you one moment. This may be a persuasive argument on summary judgment, but don't we need a record from which to determine whether a pattern exists or not? Aren't we just considering whether the plaintiffs have plausibly alleged that?

MS. SARFF: Your Honor, I have not seen any case

cited by -- in my research or cited by the plaintiffs that suggests that the -- that the legal determination of whether or not a pattern has been plausibly alleged as continuing, persistent or widespread, is anything but a legal consideration. What the plaintiffs allege, at most, is that there was a three-to-five-day period; or even if you assume it's May 26th and May 31st, that is an isolated period of time.

Our position is regardless of how many instances of force are identified within that time period, it is insufficient to be considered a custom.

The plaintiffs affirmatively plead that the purported class is only for those protests occurring or only for those individuals injured during that particular timeframe, May 26th to May 31st. And so as a legal matter, Your Honor has the sufficient pleadings in front of you to determine whether or not a three-to-five-day period can be considered continuing, persistent and widespread.

THE COURT: I suspect what we'll hear in response is that although it is a legal determination ultimately for the Court to make, it's based on a factual record, is it not? And I think what you're arguing is that every one of those facts would have to be included in the complaint for it to be plausibly alleged. Am I incorrect in that?

MS. SARFF: No, Your Honor. Our position is that

even if discovery were to occur and there were more allegations of improper uses of chemical irritants or less lethal projectiles between May 26th and May 31st, it still wouldn't be sufficient to establish a custom claim against the City of Minneapolis, and in particular, with respect to these six named plaintiffs.

And the reason for that is because the U.S. Supreme Court has held that contemporaneous or subsequent misconduct cannot set forth a sufficient notice to a municipality such that it could have conformed in time to remediate the plaintiff's injury. And so -- and so although we have a purported class here, Your Honor, we do need to look at the individual claims of the plaintiffs.

So, for example -- and that's something that we don't see happening in the plaintiffs' opposition to our -- to the City's motion. But you have, for example, the Armstrongs alleging that they were injured, I believe, on May 28th. Well, Your Honor would have to conclude that a two-day period of allegations of misuse of either chemical irritants or projectiles would be sufficient to put the City on notice that it needed to act before those particular plaintiffs were injured. And our position is that even if they identify additional incidences of unlawful uses of force or allegations of unlawful uses of force, that's not sufficient for the City to have been put on notice such that

it should have acted within time.

And within the context of a motion to dismiss, Your Honor is of course guided by U.S. Supreme Court precedent asking you to use common sense in terms of whether or not deliberate indifference could have occurred or notice could have occurred. And although the plaintiffs indicate that there was social media and traditional methods of reporting, there are no allegations in the complaint that the City of Minneapolis was on notice of these particular allegations. And even if they had been, given the dramatic state of civil unrest that warranted an emergency time -- a curfew in an emergency order from the Governor, it cannot be held that the City of Minneapolis would have been deliberately indifferent to unlawful uses -- alleged unlawful uses of force within a mere matter of days.

And that's particularly important given the fact that the plaintiffs concede in their complaint that the City of Minneapolis did in fact take remedial actions. That there were voluntary policy changes made following these protests, which means that this is not an incident -- an instance where the City of Minneapolis did not consider the events that took place over the course of the protests.

This is a case where plaintiffs are alleging three-to-five-days' notice and inability for the City of Minneapolis to come in and rectify that within mere matters

of days, given the massive civil unrest that's conceded by the plaintiffs, and then subsequently took action to correct the very issues that the plaintiffs are alleging, which is that a higher level authority needed to be giving permission or orders to authorize the particular uses of force that the plaintiffs challenge.

So that has already been done by the City of Minneapolis. That's in their amended complaint. That's in their amended complaint. And the plaintiffs have not identified any case that would disrupt settled U.S. Supreme Court precedent that said it has to be so permanent and well settled as to have the force and effect of law that three to five days could qualify for that. And that's a legal determination that Your Honor can make at this point.

In terms of the training, all I would say on that is that if you look through the amended complaint -- and it's an amended complaint which means the plaintiffs have already taken a second attempt to plead a plausible claim -- the training argument, there's no deficiency identified with the training in any regard, and that's dispositive. The controlling case law identifies that on a motion to dismiss or in the pleading requirements, that the plaintiffs have to identify a specific pleading deficiency. And here that doesn't exist.

There's no allegation, for example, that officers

are being trained about how far away someone is supposed to be when they are using a chemical irritant, or how they are supposed to aim the chemical irritant, or anything along that line. There's simply a generic allegation that there's not training or a generic allegation that the training is insufficient. And that's a dispositive issue because we're entitled to be on notice about what their allegations are as to the training deficiencies, and there's nothing in the complaint.

And then finally with respect to the policy claims, all I would point out is at this point they concede that all of the City's policies with respect to chemical munitions, chemical irritants, and less lethal munitions are constitutional. They allege only that two ordinances relating to the blockage of pedestrian and vehicle passageways are unconstitutional in the way that they are applied.

But the plaintiffs do not allege that any of the -- any of the named plaintiffs were targeted because of these ordinances. In other words, there is no causal connection between the purported policy, the ordinance violations that they identify, or should I say the enforcement of the ordinances, and the plaintiffs' actual injuries; and therefore, that's not a policy violation.

The last thing just going back quickly to the

custom claims, because of course in the Eighth Circuit precedent of *Ware versus Jackson County*, which says that there has to be not only -- it's not sufficient to simply allege allegations of unlawful force; they have to be widespread, continuing, persistent. There has to be notice, there has to be deliberate indifference, and then there has to be causation.

What I would point to Your Honor is beyond the *Burbridge* case, which is on point on a motion to dismiss, that the plaintiffs cite to a case of *Aldridge versus City of St. Louis* as setting forth the standard for a custom claim. And in that case, that is again another case involving protests and allegations that officers, not the Minneapolis Police Department, but other officers used chemical agents in an unlawful manner.

In that case, that was an instance where the plaintiffs pled other instances of unlawful uses of munitions multiple times. Three years before, two years before, and in the same year -- and then in the exact same year as the alleged incidences. And there are no cases identifying a pattern based upon the timeframe that they have alleged. There are no cases identifying a custom or a pattern based upon allegations of use of force in which the plaintiffs' allegations are absolutely contemporaneous with the other allegations.

And accordingly, we ask that you dismiss these -- dismiss all of the claims against Chief Arradondo and the City of Minneapolis because as a matter of law, the timeframe, the time period, both because of its duration and its contemporaneous nature with the plaintiffs' allegations, cannot satisfy a *Monell* supervisory liability claim.

And I appreciate the opportunity to respond, but I understand there are a lot of people for you to manage here, Your Honor. So thank you.

THE COURT: Very good.

Who wishes to be heard?

MS. HARDIN-SMITH: Good morning, Your Honor. My name is Exycyln Hardin-Smith. I will be responding to Ms. Sarff's argument on behalf of the City defendants, and of course I am representing the plaintiffs.

THE COURT: Very good.

MS. HARDIN-SMITH: Thank you, Your Honor.

So at the outset, you know, I do want to take a moment to of course respond to Ms. Sarff's specific allegations, but I want to sort of reframe the argument, in a way, taking it away from the argument that we heard from the City defendants.

The City defendants have given us a lot of justifications and rationalizations for the conduct that Minneapolis Police Department officers displayed, this

excessive force. And I think it's important that we frame that as this is just unconstitutional policing. Like, the end of story. Like, it's unconstitutional policing. And the fact that the City defendants are trying to split hairs by talking about this timeframe and whether they had notice or not is just -- it takes away from the issue that there's no excuse for unconstitutional policing at any point in time. It's not justified simply because this is an unprecedented event. It's not justified simply because we're in a period of extreme civil unrest, as the City defendants qualify it. Unconstitutional policing is just simply inexcusable and we cannot make justifications for it the way the City defendants have tried to do here.

So turning to the City defendants' specific arguments, in terms of our *Monell* claim regarding an unlawful custom and policy being so pervasive and persistent as to become law, we disagree, of course, with the defendants' characterizations of what happened here. If you look at the 2020 incidents just in and of themselves, within the City defendants' briefing they try to reduce what happened in the week following George Floyd's murder to four occasions of misconduct by focusing in on the specific days on which there were allegations of excessive force by -- as pled for our named plaintiffs.

However, what we're talking about here are not

simply four occasions. We're talking about multiple occasions where each time an officer made a decision to fire a canister of tear gas or to fire a round of less lethal munitions at a protester who was peacefully assembled exercising their First Amendment rights, each one of those is a separate occasion upon which the City defendants had a choice and an option not to use excessive force but they chose to do so. So we take issue with that at first.

And then secondly, we're talking about five named plaintiffs here who are representative of a putative class of plaintiff. So of course we only pled with specificity to these specific allegations that happened to our specific named plaintiffs, but we of course also pled that there was widespread use of excessive force by the Minneapolis Police Department throughout the timeframe between May 26th and May 31st. So we want to make sure that we do not reduce the arguments simply to just what our named plaintiffs have pled specifically.

The City defendants also make arguments that we are trying to create a custom or policy strictly based on the number of people that were involved in these incidents pled for the 2020 protests. However, although that of course plays a factor, that does not inform fully our custom and policy argument. What it does is it goes to the notice aspect that is required in proving an unlawful custom or

policy argument.

The City defendants want to argue that somehow they were not on notice of the excessive force demonstrated by MPD officers daily from May 26th through May 31st. Certainly, and as the City defendants have acknowledged, we live in a 24-hour news cycle now. News coverage is on 24 hours a day, and of course you have social media outlets where you can witness and find news live all the time. And certainly in this week following the -- following George Floyd's murder, Minneapolis was front and center on a national stage.

So the fact that somehow the City defendants are arguing that they were not on notice of this excessive force when the rest of the world clearly was is just implausible, Your Honor.

And I think further what the City defendants are trying to claim here is that somehow the timeframe of three to five days was too short of a time period for the City defendants to, one, be put on notice; and then, two, be able to act and intervene. And we also find that doesn't mesh with the facts as pled in our amended complaint.

First, of course, as I mentioned, the 24 hours news cycle, the fact that the rest of the world surely saw the excessive force that the MDP officers were demonstrating against peaceful protesters. But also if each day, as pled

in our complaint, starts with May 26th, each day the protestors went home. The protestors were not out protesting 24, 48, 96 hours in a row. Each day they went home. Each day the City defendants had an option and a decision to make about how they were going to react to the protestors the following day. And each day, for at least for the allegations that we have pled here, each day the City defendants made the choice to use excessive force against plaintiffs. Peaceful protestors. They had an opportunity to make that decision and to intervene and to change course and they did not do so.

This is further evidenced by the fact that, as pled in our complaint, lots of -- in quite a few scenarios the plaintiffs often went back to the same scene that they were protesting at the prior day, and many times they came back and they noticed when they arrived on a subsequent day that there were barricades directed around the precincts. There were now police perched on top of the roof of the precincts.

So the City defendants had enough notice to act and intervene by erecting barricades around precincts, by perching officers on top of the precincts to do what we assume they thought was protecting the precinct, but they didn't have an opportunity to intervene and stop police officers from using excessive force? Those two facts just

do not jive, Your Honor. If you have an opportunity to intervene and erect barricades and to perch officers on the roof of precincts, you similarly have an opportunity to correct your officers and to tell them not to use excessive force against protestors.

And what this highlights for us, Your Honor, is the fact that the training was sufficient within the MPD. And that goes into, of course, another angle from a *Monell* liability, but if the training had been sufficient, the officers of the MPD would have been able to regroup quickly and get an instruction out to the officers to not use excessive force, to follow MPD guidelines. The fact that that was unable to happen just is a further demonstration of the fact that the training is sufficient.

Now, if we move on to talking a bit more about how the training was sufficient, this is seen as pled in our complaint, Your Honor, in the actual MPD policies. MPD policies, there were a number that governs things that if -- I think if had been followed, maybe we'd be in a different position than we are currently. There were a number of MPD policies that stated that chemical irritants and less lethal munitions should only be used if needed to protect oneself. Should not be used to interfere with lawful protests or demonstrations, and should not be used on individuals demonstrating passive resistance.

Nothing that is pled in our complaint demonstrates remotely that our plaintiffs were acting even with passive resistance. None of our plaintiffs did fail to comply with a disbursal order, because in most cases there was none. In the one case where there was a disbursal order issued, in the case of Ms. Clark and Ms. Hempfling, they immediately began to disburse, but were not given an opportunity to do so before they were kettled by police officers and fired upon with less lethal munitions and chemical irritants.

So there's no fact here, Your Honor, that would give -- that would give the MPD grounds to even use chemical irritants or less lethal munitions according to their own policies. And the fact that those policies were not followed demonstrates either a lack of training as to those policies or that somehow the training is insufficient. That's the most logical inference if you have policies and you directly go against them and don't follow them.

Also, as noted in the Supreme Court cases of *Hanten*, there is just also an option for single incident liability. So it doesn't even require this full-blown policy or custom or notice. The fact is that if you are going to arm MPD officers with less lethal munitions and chemical irritants and put them in situations where they can potentially use that on crowds, you have to give them appropriate guidance so that they use those weapons within

constitutional limits.

It's just so obvious -- and that's the standard, Your Honor, is that the need for training is so obvious that there's no notice required. And that is the case here, Your Honor. You cannot arm MPD officers and put them out with crowds of protestors and not tell them -- not inform them of constitutional rights of protesters so those are not violated. And that's exactly what we have demonstrated here based on the allegations we have pled in our complaint.

But if we move on to talking about City ordinances, the City ordinances are unconstitutional on their faces as we have alleged, just because they don't give citizens notice of what qualifies as unlawful conduct. The two ordinances that we pled, 466.240 and 385.65, both deal with vehicular and pedestrian traffic and blocking that. And so there's just no clear point in the ordinance language that makes clear what qualifies, like when the line is crossed as to when a plaintiff or a citizen will be in danger of violating those laws.

So I do want to take a quick double back and talk a bit about some of the more specific allegations that the City defendants have made regarding some of the case law with regards to *Monell* liability. So we understand, of course, the cases are recited, and particularly the *Burbridge* case that references the three-day period

targeting a hundred people, but what we're talking about here is -- is just -- the case law just does not match what we're discussing here in terms of the incidents that happened in 2020. We're not talking about isolated incidents where the defendants had no notice of the conduct of MPD officers. We're not talking about incidents that -- that affected a small number of people so it's possible the City defendants could just be unaware. There's no plausible argument here that the City defendants were unaware of what was happening in the 2020 protests.

And if you look to the 2015 incidents that we pled in our complaint, those -- the argument that the City defendants are trying to make between the two separate years, 2015 to 2020, also doesn't quite jive with the specific case law that's referenced. Understandably, a five-year difference is something to note. However, the fact pattern of the 2015 incidents and the 2020 incidents are the same.

What we are talking about is an MPD officer kills an unarmed person, and in all of these scenarios it's an unarmed black person, and then it gets news coverage. It sparks protests, and the MPD meets those protestors by firing chemical irritants or less lethal munitions at them. That's what happened at the two incidents pled in 2015 when Tony Robinson and Jamar Clark were killed, and that's what

happened in 2020 when George Floyd was killed.

So -- and the facts that the City defendants are trying to distinguish somehow between the use of chemical irritants in 2015 versus the use of both chemical irritants and less lethal munitions in 2020 is a distinction without a difference. These are both considered, both chemical irritants and less lethal munitions, are crowd-control tactics used by the MPD, used by law enforcement. They're simply -- they go into the same category and there's just no argument that a use of chemical irritants versus a use of both chemical irritants and less lethal munitions is somehow distinctive. The fact patterns are the same and that is the issue that we're dealing with.

And, you know, potentially and what our argument is, Your Honor, is that discovery of what has happened between the years of 2015 and 2020 may further flesh out additional incidents and additional fact patterns that demonstrate that this has happened more often than just between 2015 and 2020.

So those are our arguments as to dispute the fact that the five-year gap somehow plays some significant role here. The fact patterns are the same, or substantially similar, unlike what we are talking about in the case law cited by defendants.

And I also want to make a point to distinguish

this concept that the 2020 incidents were contemporaneous and happened all at the same time by reemphasizing the fact that each day protestors went home. These were not all happening at the exact same time. We're not pleading that on one day the Minneapolis Police Department went around and targeted a thousand people with tear gas and less lethal munitions. We're talking about a period of six days where there was full-blown news coverage of what was happening on a daily basis and the City defendants chose not to act.

We also feel that based on the deficiency and the training as evidenced -- I'm sorry -- of the sufficiency of training as evidenced by the MPD officers' failure to follow their own MPD guidelines, that further contributes to supervisory liability of Chief Arradondo. The fact that we have not pled that Chief Arradondo was on the scene and gave a specific order is irrelevant to supervisory liability. The issue here is that there was a failure to train. And the fact that the MPD officers did not follow their own training is a clear -- is a clear inference that Chief Arradondo somehow failed to train his officers adequately and therefore is liable under a theory of supervisory liability.

Thank you, Your Honor.

THE COURT: Let me ask you about that last point. Are you suggesting that that would lead to individual

capacity liability on the part of Chief Arradondo, or is that in support of your argument that there's official capacity liability?

MS. HARDIN-SMITH: Thank you, Your Honor. That is our basis for individual liability for Chief Arradondo.

I'm sorry, go ahead.

THE COURT: No, you go ahead and finish.

MS. HARDIN-SMITH: Just to sum it up, the fact that Chief Arradondo failed to train his inferior officers, the MPD officers, subjects him to individual liability.

THE COURT: Now, can you cite to me a case to that effect? Typically individual liability requires actual acts, but sort of hooking it into *Monell* liability typically doesn't work. Tell me about a case in the Eighth Circuit in which sort of a general allegation of the chief of police failed to train provided a basis for individual capacity liability.

MS. HARDIN-SMITH: Sure, Your Honor. If you look at the *McGuire v. Cooper* case, that demonstrates that 1983 liability, under a theory of supervisory liability, can create liability for a chief of police such as Chief Arradondo.

THE COURT: But is that a case in which it was supervisory liability in the way that you're arguing it; that is, generally failing to train; or is that a supervisor

of an individual police officer who injured somebody?

MS. HARDIN-SMITH: So that is based on a theory that the chief, the oldest supervising officer, put officers in a situ -- created a dangerous situation where the officers were not trained to sufficiently deal with the situation, and basically created a danger for the officers and their interactions with citizens, and in our case the plaintiffs.

THE COURT: But what are the facts of *McGuire*?

MS. HARDIN-SMITH: So the facts of *McGuire*, as I understand them, relate to -- it does qualify for a specific supervisor. It is not limited strictly to just a failure to give an order or just failure to train. It's a matter of the officer -- of the chief, the supervising officer, creating the dangerous situation. So just the ultimate failure to train his inferior officers that created that supervisory liability.

THE COURT: Okay. I'm worried that we're -- that there really isn't good authority that would hold Chief Arradondo individually liable in his individual capacity based simply on an allegation that his police force wasn't adequately trained. That sounds like official capacity liability to me. But in any event, I will take a good look at the law you cite.

I'll go back to Ms. Sarff now.

MS. HARDIN-SMITH: Thank you, Your Honor.

MS. SARFF: Your Honor, one of the things I want to stress is that when we bring a motion to dismiss we're doing so based upon the four corners of the amended complaint that is in front of us. And if you -- just starting where you left off, Your Honor, there are no allegations in the complaint that relate to Chief Arradondo other than official capacity claims. They all relate to him being the chief of police. They all relate to his position of authority. They don't relate to his direct involvement or any actions that he undertook that would have led to these constitutional violations.

Additionally, we want the plaintiffs to be constrained to what's in their amended complaint. For example, what you did not hear the plaintiffs say is that there's any cases that -- that allows deliberate indifference to be found upon mere delay in action. What you heard the plaintiffs say is that it's inconceivable to them that Chief Arradondo or the City wouldn't have acted within a matter of days because the protestors went home at night.

That is nowhere in the complaint and it defies absolute 24-hour news coverage to say the protestors went home at night when the Third Precinct burned in the middle of the night. If you were here in Minneapolis, or

Minnesota, you know that those protests were not 9:00 to 5:00 occasions. They were round the clock. That's why the Governor of Minnesota instituted a nighttime curfew. There were no instances during this period of massive civil unrest where there was time off.

And their suggestions, which are not in the complaint, that there was time to put up barricades, were in fact efforts to create distance between the rioters and the protestors and the police officers. That was in fact action attempting to deescalate or to remove opportunities or the necessity to use force by creating distance. You do not see anything in the complaint that says that there was time in the three-to-five-day period, let alone in the two days before the first named plaintiff alleges they were harmed, or the first three days where the next three and four named plaintiffs alleges they were harmed. That doesn't exist.

There are no cases, no cases, cited by the plaintiff that disrupts U.S. Supreme Court precedent that has to be so permanent and well settled as to create a custom. And there are no allegations indicating that Chief Arradondo or the City of Minneapolis knew that there was widespread constitutional violations. To be clear, the fact that force was used is not the equivalent of a constitutional violation.

And what I will say is almost everything that the

plaintiff said during the first five minutes of their presentation to this Court are allegations against the individual Doe defendants. We do not dispute that the named plaintiffs can pursue claims against the named or the unnamed Does. That they have plausibly pled that they were peacefully protesting and force was used against them unlawfully. That has every right to come in front of Your Honor and to be pursued by discovery.

But they are asking to hold the City liable for the individual conduct of officers based upon mere days during massive civil unrest when absolutely -- when basically nobody was going home at night, which necessitated a nighttime curfew. And that is not sufficient to create liability for the City of Minneapolis.

And when the plaintiffs say that there's no distinction between chemical irritants and less lethal munitions, that also defies Eighth Circuit and U.S. Supreme Court precedent which says that they have to allege similar instances, similar uses of force, in order to make out a custom. There are no allegations of an unlawful use of less legal projectiles until May 26th. That's the first time that the plaintiff alleges it. That's on the same day that they are alleging that they are being subjected to chemical irritants, which means it's contemporaneous.

There are four occasions alleged in the complaint.

They are contemporaneous with one another. And even if you consider the purported class, even if you consider other protestors, those are also mere contemporaneous. As a matter of law, the City of Minneapolis was not on notice. As a matter of law, the City of Minneapolis was not deliberately indifferent.

And it's important to note that the plaintiffs are asking you to conclude that notice and deliberate indifference are the same thing when they are not. A defendant can be on notice of unlawful conduct and not be deliberately indifferent to it. It may be that there's a delay in reaction, which this District has said does not amount to deliberate indifference.

And you will note that the plaintiffs do not dispute that the City of Minneapolis took the very corrective action that they wanted it to take. And so there's no way, based upon the four corners of the complaint, what they have alleged, not what they've just said in a presentation to the Court, but what's in the complaint that we have notice of that we're able to present to the Court, none of that indicates deliberate indifference, none of it indicates notice, and none of it indicates a custom that was sufficiently long to be considered continuing, widespread and persistent as a matter of law.

And I would also point out, Your Honor, that when plaintiffs attempt to go to single incident liability, that is an implicit recognition that there's not a pattern of misconduct that the City would have been on notice of. But in order to find it was so obvious that harm would have happened if more training wasn't provided, they have to point to some sort of incidences. They have to provide some factual allegation that it would have been so obvious to the City. But they don't point to even a single incident of unlawful use of a projectile before this three-to-five-day period, and they don't allege anything but a five-year gap in the purportedly unlawful use of chemical irritants.

And I say "purportedly unlawful" because, again, that's a presentation that they have made in briefing, it's a presentation that they have made to you here now, but it's not in the complaint. In the amended complaint they simply allege that there were two incidences five years ago of officers using chemical munitions. That does not equate to unconstitutional conduct. It simply doesn't.

And so, Your Honor, if you look back to the complaint itself, as a matter of law you can see that there are not sufficient allegations against Chief Arradondo individually. There are not sufficient allegations regarding a specific training deficiency. There is no causal connection between the ordinances they challenge and

a use which relate to blocking pedestrian or vehicle traffic. And there are allegations that there have been chemical munitions or less lethal munitions used against them, and there is no indication otherwise that there's any basis to hold the City of Minneapolis liable.

We fully understand that the Does should be challenged for their conduct. That the plaintiffs can challenge that conduct; but they have not, quote, unquote, drawn the City of Minneapolis into this lawsuit based upon their allegations.

Thank you, Your Honor.

THE COURT: Okay. Let's move ahead then to the motion to dismiss filed by Lieutenant Robert Kroll, please.

MR. KELLY: Good morning, Your Honor. Joseph Kelly on behalf of Robert Kroll, and thank you for arranging this over Zoom under the current conditions.

Defendant Kroll joins the City of Minneapolis in its position that our motion to dismiss does not foreclose the plaintiffs' ability to hold accountable the officers that used force if found to be unlawful against the named plaintiffs. However, just because force used by another is alleged by the plaintiffs, it does not create liability against the union president that is the exclusive representative of those actors.

Plaintiffs acknowledge in their memorandum that

their suit against Robert Kroll is solely because of his position as the president of the Police Officers Federation of Minneapolis. As the -- when Kroll acts as the president of the Police Officers Federation of Minneapolis, he is acting as a private citizen as a matter of law.

As this Court has found, the Eighth Circuit has found and the Second Circuit has found, as cited in my memoranda, when acting in the capacity as a union president or union official, Robert Kroll is not a state actor subject to 1983 liability.

Most on point in the Second District was the *Kern versus City of Rochester* case. In that case it was a union firefighter president, the firefighters union president, who is also a lieutenant in the City of Rochester's fire department, who was a full-time employee of the City of Rochester, full-time pay and benefits from the City of Rochester. He himself engaged in alleged wrongdoing against an employee of the union. He was alleged to have engaged in sexual harassment and sexual assault, and a lawsuit was brought against the union president in his -- as a state actor under 1983 claiming that because he is a full-time employee, he's cloaked with authority from the state.

And the state -- and the Second Circuit in that case found explicitly that when acting in his capacity as a union president, he is not acting as a state actor cloaked

with authority to subject himself to 1983 liability and ultimately dismissed that case because there were no set of facts that could be presented to prove otherwise.

That case is nearly on point with the case in front of you, the only difference being is that Robert Kroll is not alleged to have actually done the act that caused harm.

Likewise, in this court and the Eighth Circuit in the *Magee versus Trustees of Hamline University* have also found that in that case Dave Titus, who was a police officer and president of the St. Paul Police Federation, wrote and published an opinion piece in the newspaper calling for the termination of a Hamline University professor. The court in Minnesota and the Eighth Circuit both found that there was not a -- that that is insufficient to create 1983 liability because in that case Dave Titus, although he identified himself as a police officer, and likewise became the president of the St. Paul Police Federation because of his position as a St. Paul police officer, that is insufficient to create 1983 liability because, like here, he was acting in the scope of his position as a union president, not as a police officer.

Here, the plaintiffs --

THE COURT: Mr. Kelly, I think we would all agree that the allegations as to Lieutenant Kroll are slightly

different. They are slightly unique in this situation and they have to do with the power and influence he allegedly wields over this police force. Whether or not he's -- he certainly -- the allegation is not simply that he has 1983 liability because of his position. It's what he's done with his position.

And so my real question to you is how could I decide that on the basis of the complaint? Don't I need to have a record of facts in order to determine under the case law that occasionally holds private actors liable, or even to determine whether he was a private actor in this case? I mean, you refer, for instance, to the contract and his position and all that. Those are all facts. And at this stage of the game I need to only consider the facts as alleged true. I'm not to look at other documents and contradict the facts as alleged.

That may certainly be the case on summary judgment. I'm having trouble at this point figuring out how I could do this at this stage of the game.

MR. KELLY: Thank you, Your Honor. First, I would add, to address your first point in part, they are not alleging that because of his position as union president that he has liability. However, that's actually what they argue in their memorandum is that because he is the union president of a public sector union, he is a state actor.

That is their argument.

Secondly, understood that, yes, you are supposed to look at the face of the pleadings. However, the pleadings themselves and/or the plaintiffs' argument in opposition acknowledge that it's solely because he is the president that he is in fact liable as an actor. And in this case the pleadings embrace the contract between the City of Minneapolis and the Police Officers Federation of Minneapolis and should be considered.

And, you know, as far as the factual entry, there are no facts that need to be discovered for this Court to make a decision that as a matter of law, whether the president of a police officers' -- of a union is a state actor. That is well settled that a union president is not a state actor period. That's settled Eighth Circuit, that's settled Second Circuit.

Likewise, the next question is how he wields that authority or that position. Frankly, what the plaintiffs are asking is essentially to create a *Monell* liability to a third party private actor, which there is no law to support such a position saying that a third party, the president of a union, based upon statements that he makes in his capacity as a union president, has an influence over the culture of the police department.

So what they are trying to do is create private

actor liability under 1983 for a *Monell* claim, which would be a claim against the City. So as -- and in citing their complaint in support of their position of the, quote, unquote, undue influence, is all activity that's protected -- not just protected, but required by -- for the union to engage in, including engaging in collective bargaining and filing of grievances when there's discipline or discharge of officers for alleged violations of policy.

So those alone are protected by statute and the Constitution, both his speech and filing of grievances and engaging in collective bargaining.

What the plaintiffs allege is, at the most, is they claim that there is an influence that he has -- they acknowledge as a police officer, as federation president, he is not acting as a police officer. He's acting as union president. And when not acting as a police officer, he does not have supervisory liability against him because he didn't actually -- they didn't allege that Mr. Kroll directed any of these officers to deploy munitions, nor could they with any good faith.

In fact, all they are saying is that what they cite to as examples are other instances over the, you know, years before this -- the incident here in 2020 where Robert Kroll spoke publicly in support of his members and filed grievances seeking an independent arbitrator to overturn the

termination, the examples I gave, of two officers. Ironically, of those two officers they cite as examples of how disturbing it was that the union filed grievances for termination, an independent arbitrator found that there was just cause to terminate.

So the examples that the plaintiffs provide to show that he somehow influenced excessive force is actually rebutted by the actual proof of what happened and the procedural history because it actually shows the opposite. It shows that those officers, although a grievance was filed, they ultimately didn't get their job back for their alleged wrongdoing.

THE COURT: Okay. Well, let's just unpack that a little bit. I think there's two concerns raised by what you say. First of all, I interpret the plaintiffs' argument about private actor 1983 liability not to be an argument that they acted in concert with the City and are therefore somehow in concert with the City's failure to train or supervise or the City's policies. Rather, as you point out, the allegations have to do with his private actor liability in concert with the John Does, that is attempting to encourage or influence them to violate the training or the City's policies. That's how I interpret what the plaintiffs are arguing, actually at cross purposes with the City.

But in the end, you know, going back to what

happened in the past in this procedural history that you discuss about grievances and the like, that's hardly embraced by the complaint. I mean, those are fact questions that the Court can better consider with a record. I mean, you may be right at summary judgment, but it's hard to imagine at the motion to dismiss stage that we could dismiss this claim.

So again, the two focuses for your response would be this reframing of the private actor liability that I have described. And secondly, again my concern about doing this at the pleading stage.

MR. KELLY: Thank you, Your Honor. So as far as the private actor liability I pointed out in my reply brief, but private actor liability is, under 1983, generally prohibited with very few exceptions, the exceptions being a conspiracy claim, civil conspiracy claim, where there had to be specific allegations that the private actor acted in concert with some other public official for the public official to then wield their authority in violation of someone else's civil rights.

There's no allegation that Robert Kroll contacted John Doe 1 or 2 saying you should engage, use force, in the following manners. The complaint itself cites to a letter to the chief of police, an e-mail to the chief of police and the command staff that occurred after the majority of the

allegations that were made by plaintiffs, the specific allegations of the plaintiffs, where it was a letter from the union president to management voicing concerns of the membership. Period. That is what a union official's job is to do is to relay concerns about terms and conditions of employment.

The other citation in the complaint was to a letter after the fact to the membership that doesn't reference essentially anything of the alleged conduct. It does not -- there's no call to arms. There's no call to you should use force. All it points out is the union will eventually voice their concerns at the lack of leadership provided by state and local leaders during the riots. That's it.

The complaint does not allege, nor could it reasonably allege, that Robert Kroll engaged in a civil conspiracy with specific actors to conduct specific actions. The complaint itself, and their argument in support or in opposition to our motion to dismiss, is specific about how, as the union president, he holds influence and provides input which somehow creates liability, which as a matter of law it does not.

Now, if there were facts that were alleged, that were properly alleged, that were supported and clearly alleged in the complaint of a private actor engaging in a

civil conspiracy to violate the rights of others, then potentially, sure, there would be a need for discovery to determine what communication, if any, took place.

However, that's not what this complaint alleges. This is a complaint that says as the union president, he is a state actor. End of argument. And then as an afterthought they say that, Well, some courts have previously found private actors as liable. But those cases that are cited are very fact specific and would allege that they were after the allegation, which there is not here, that the private actor conspired with a public actor and the public actor wielded the force.

There's no allegation in the complaint that Robert Kroll requested any party to do any act because he did not. The two communications that are cited prove otherwise. They prove exactly the opposite of that. They are generally speaking saying nobody is saying -- everybody is blaming the officers for everything that's happened in the City of Minneapolis and we will be here on the back end, essentially.

The problem is, again, as a matter of law -- I have to get back to it, I can't stress enough -- as a matter of law, acts done as a union official are not state actor actions. If it's a general -- like you point out, if there was an allegation that Kroll had personally contacted

specific officers and engaged them or encouraged them to do an act, that would be a different story, but you just don't have that here. What they have in the allegations are merely those two letters, and those rebut any claim of civil conspiracy.

The reason why a claim against a public official being a -- or a public sector union officer is not a state actor under 1983 is because of the importance of public sector unions to engage in speech. As addressed in the *Janus* decision from 2018, under the plaintiffs' theory, every public sector union official is a state actor. And that's just -- that's an absurd result, and it would fly in the face of *Janus* which notes the importance of the separation between a public sector union and the government as a whole. Because if the -- if the union officials were actually state actors, that would mean that they would be -- have to be responsible to the direction of the employer, which would defeat the purpose of collective bargaining, and in Minnesota, the Public Employment Labor Relations Act.

And on that note, the only case citing to the proposition that a union be held liable that was cited by the plaintiffs, held liable under 1983, was the *Dossett* case. But the quote that was attributed to *Dossett* actually came from *Hudson versus Chicago Teachers Union Local No. 1*, the quote regarding some public sector unions can be held

liable under 1983. That was a very fact-specific case that dealt with agency fees with public sector unions.

And that was another case where the union was found to potentially have been a state actor because they worked with the Government in withholding union dues from members' paychecks. So that is the only time that private actors, including unions, are held liable is if acting in concert with the -- with the Government.

The other cases were cited were private sector organizations or private organizations that were either a public function was completely turned over for their use, like the airport case, and then they still wielded law enforcement officials to do an act on their behalf at their specific request to prohibit speech. Again, what we have here is an allegation that Bob Kroll wielded influence over officers because he had made previous statements. And part of their -- in their complaint, in their argument, their issue that they have is that Defendant Kroll failed to acknowledge the rights of the citizens to peaceably gather and protest.

But that's the important piece to note here is that as the union president, as a union president, the duties that Robert Kroll owes are to the members and to the Police Officers Federation of Minneapolis. Because he is not a public official, he does not owe a duty to inform or

to train. And in fact if he were to do so, he would be impeding on the City and the Minneapolis Police Department's duties to train the employees.

And because the complaint is based solely on his position as union president and not because he engaged in some sort of conspiracy with John Does, at this stage the Court has sufficient information in front of it and as a matter of law should rule and dismiss Robert Kroll from this lawsuit.

THE COURT: Thank you.

Who wishes to respond?

MR. DAVIS: I do, Your Honor. This is Mr. Davis from Fish & Richardson again. Thank you for having this hearing and may it please the Court:

I think that based on what I've heard so far, Your Honor has it exactly right based on how we see this and I'm specifically referring to the importance of understanding the difference between the pleading standard that the Court has to consider at this stage under *Twombly* and *Iqbal* in order for us to go forward and what the Court has to consider at the summary judgment stage to see whether we have identified and come forth with a triable issue of fact.

There were a few statements that Mr. Kelly made there on behalf of Lieutenant Kroll that I want to address, but the first and most important I think relate to whether

in fact Lieutenant Kroll cannot be a state actor as a matter of law. That's what Mr. Kelly said. I just don't think that's right, Your Honor. It is the case that it is not frequent that a union or someone acting within the union is found to be a state actor, but even the case that we cite, which is the *Montgomery* case, it's from the Tenth Circuit, but that case which points to *Dossett* says that it's not generally the case that a union, or police union in particular, is a state actor. And so it leaves open the opportunity for there to be a state actor even if that person happens to be the president of the union.

The two cases that they rely on, *Kern*, which I think is a Second Circuit case, and then Magee from this circuit, are both distinguishable and I want to talk about those very briefly.

First, with respect to *Kern*, I think Mr. Kelly set forth the facts accurately and that shows why that case is different. In that case it turns out that the party against whom the 1983 action was alleged was the president of the fire department union and he had made sexual advances and actually attempted to rape his secretary in the bathroom, or his administrative assistant.

And so on its face, the facts there were very different because the allegations that were made were made against him in his role as president and specifically having

nothing at all to do with his status as a firefighter other than the fact that that was why he was in the role and why he had that administrative assistant in the first place. That is not the facts in this case at all.

Magee, admittedly, is a little bit closer, but again, it's quite different in our view. In that instance, as I believe Your Honor is aware, the head of the union in St. Paul wrote an op ed about the law professor at Hamline and directed that towards the public itself in a newspaper article. And I think he encouraged -- Mr. Titus encouraged another police officer to write a similar article and to publish something that was facing the public more generally and advocating a position that was clearly and squarely within the four corners of the role as the president of the union.

That is not the situation that we have here, Your Honor. In this case, Mr. Kroll -- while it is true that Lieutenant Kroll is in his position because he is a police officer, what we have alleged in the complaint and what the Court can take judicial notice of based on the other issues that we have identified in the footnotes to our complaint in our brief, is that there is a long history of Lieutenant Kroll in this jurisdiction exercising outside influence over the police force for the entirety of the time that he has been the president of the police union. We put this in our

opposition brief but it's clear that Chief Arradondo himself actually said to Lesley Stahl in a *60 Minutes* interview shortly after all of this happened that Lieutenant Kroll exercised influence over the police officers.

And Your Honor is correct. I think you have nailed the allegations that to the extent that there is private actor liability -- I don't think we need to go here -- but to the extent that there is private actor liability, it has to do with the relationship that Lieutenant Kroll has with the John Does. The outside impact and influence that he has on the rank and file police officers and how that impacted what we saw over four days in May from the 26th to the 31st on the streets of Minneapolis.

It is absolutely true that after we have an opportunity for discovery, we may be back in front of Your Honor and Mr. Kelly may stand up and say they haven't educed the facts that they need and so summary judgment is appropriate. And if we haven't, then I will have a challenging time to make those arguments because we won't have developed any triable issues of fact.

But at this stage of the case what we need to do in order to defeat their motion to dismiss is show that based on what is pled, accepting all those allegations as true, as well as to real inferences that Your Honor can draw from those allegations, whether with discovery we can prove

up this case. And based on the allegations that we made, we would suggest to Your Honor that that is absolutely the case.

Is it plausible to believe and to suggest that Lieutenant Kroll, in encouraging that officers engage in warrior training and how they approach the citizenry of Minnesota and Minneapolis could lead us to develop discovery suggesting that Lieutenant Kroll actually had officers who were impacted by what he said? Absolutely. That is a plausible explanation for what discovery would show.

Is it reasonable to believe that when the city council members that we have quoted in our complaint and the chief of police himself and others have suggested this role that Lieutenant Kroll has is having an impact on the rank and file officers and that Lieutenant Kroll knows and understands and actually takes active steps to do that, the discovery may show that based on how we pled this, we would say the answer to that question is absolutely yes.

Is it a foregone conclusion that Lieutenant Kroll is acting under the color of law as is required to be a state actor primarily? We've pled it enough here. And I understand Your Honor pointed out that, you know, there were things that were outside of pleadings that Lieutenant Kroll attached to his motion to dismiss; and Your Honor doesn't need to look at all that to satisfy herself, I think, that

the allegations are sufficient. But to the extent that Your Honor does, those things actually support what we're saying and the role that Lieutenant Kroll plays not just merely because he happens to be the federation president, but specifically the role that he plays in interacting with the police and in influencing policy.

Let me just touch very briefly on the speech issue that was raised in the briefing and that Mr. Kelly spoke about briefly when he was arguing. We said this in our brief and I want to reiterate it here. The allegations that we have made in the complaint against Lieutenant Kroll have not, and do not, intend to quell him from speaking his mind or to somehow circumvent his ability to exercise his First Amendment rights. He is absolutely right that we and the ACLU filed this case in parts because we were so concerned about quelling and circumscribing the exercise of First Amendment rights.

But when someone who is a lieutenant highly regarded in the Minneapolis Police Department and someone who also happens to be the president of the police union is exercising speech in a way that he reasonably knows, or ought to know, has an impact on the rank and file such that there end up being ordinary citizens who are exercising their constitutional rights, and those rights are deprived as we have alleged in this complaint, we don't think that

that is an absolute and complete defense to our allegations. I don't believe I saw in either the opening brief or the reply from Lieutenant Kroll a case that said that a First Amendment allegation -- a First Amendment was a complete defense to a 1983 allegation.

Finally, Your Honor, on this point, unless you have questions, I'll leave on this. I want to address the private actor liability issue. As I said, we don't think you need to get that far at this stage, but to the extent Your Honor does, I would encourage the Court to take a look at the cases that we cited and that Mr. Kelly cited on behalf of Lieutenant Kroll. I could be wrong. I've read a lot of cases preparing for this hearing, but I don't believe that any of the cases that were cited on this issue say as a matter of law that we need to plead a civil conspiracy in order to satisfy the *Twombly-Iqbal* standard to make out an allegation for a private actor liability. I don't think any of the cases that Mr. Kelly cited say that.

What they say is there needs to be a persuasive intertwinement of acts between the private actor and the actual state actor that caused the depravation of rights. And here, as we've alleged, we don't think there's any question that if the Court were to view Lieutenant Kroll in his private capacity, that those allegations are sufficient to withstand *Twombly-Iqbal* at this stage. So unless the

Court has questions, I'll rest on briefs.

THE COURT: Thank you.

Okay. Mr. Kelly.

MR. KELLY: Thank you, Your Honor. So I just wanted to address again that I think it's been made clear that the plaintiffs' position is that as the federation president, Robert Kroll is a state actor as a matter of law. The case law says otherwise. The case law from this circuit and the Second Circuit says otherwise.

THE COURT: I have to interrupt you there. I didn't hear that. What I heard is that he might be a state actor and so we need to see a record to determine that. What they are arguing is you can't -- the Court shouldn't rule at this point that he's not a state actor as a matter of law. Okay? It's a little bit different than the way you described it.

MR. KELLY: Understood, Your Honor. But the status, it's not that there's no factual entry that needs to be made about whether somebody is a state actor or not. It's clear whether you are a state actor or not. And that case law is clear that union officials when acting in their capacity as a union officer are not state actors and are subject to 1983 liability.

THE COURT: That's the *Magee* case, and I have looked at it before and I just can't remember the answer

right at this moment. Was that decided at the pleading stage or at summary judgment?

MR. KELLY: Pleading stage, Your Honor. It was a motion to dismiss; and then *Magee II* was a denial of a motion of a request to amend the pleadings to include the Saint Paul Police Federation as a defendant. And they, in the second *Magee*, found that there's no plausible facts that could be found that the union -- the St. Paul Police Federation was liable under 1983 either.

Now, *Magee*, what I pointed out, was the possibility of private liability for 1983 purposes. However, *Magee* also addressed the -- at the pleading stage, whether Dave Titus as the federation president, whether enough facts were pled to provide private actor liability to 1983. And what you need to properly plead is a willful participation in joint activity with the state or its agents. Joint activity in that case, in *Magee*, which also cited *Gibson versus Regions Corporation* and *Lugar versus Edmondson Oil*, pointed out joint activity needs to be a meaningful meet -- it needs to be a meaningful meeting of the minds.

And in this case and in *Magee*, what they alleged was that there generally was a meeting of the minds; but what actually was alleged was an opportunity for the meeting of the minds. Which, like here, that's all that's been

alleged is that Defendant Kroll holds a position with the police federation so he has the opportunity to meet and speak with officers.

But what you don't have here in the complaint is an allegation with specificity to be able to respond in a meaningful way of a -- of joint activity between Kroll and any of the actors that performed alleged wrongdoing.

As acknowledged by the plaintiffs, all they are alleging is that Robert Kroll, as the police federation president, holds influence and people are impacted by what he says. That is not enough even for a civil conspiracy.

But that's not even what's pled in the complaint. But assume that it was pled in the complaint. That's not enough that they can plead a civil conspiracy because a one-way statement, which is exactly what we have here as alleged, statements from Kroll, is insufficient as a matter of law pursuant to *Magee*. You need an actual meeting of the minds, which is not pled in the complaint. And for that reason, the complaint fails against Kroll.

And exercising speech, whether it -- again, one-sided speech is not enough to then create liability for the wrongdoings of somebody who heard that speech with very specific exceptions. Those exceptions being, you know, your defamation or an immediate call to arms. But as the ACLU has pointed out previously, even in those cases where

there's an allegation of somebody saying if you go into that store we're going to break your neck, that's not enough for calling for a riot or creating any sort of liability for wrongdoings of others.

What you have here is a vocal, outspoken president of the union that I completely understand a number of people, including the plaintiffs, do not like what he says. However, he cannot be held responsible for alleged wrongdoing of a third-party who said -- who even if they did say his statements influenced me to decide to use force, unless there's allegations specific saying, you know, Defendant Kroll was on the scene and told me to do this act, that would create liability.

But you don't have that here. What you have here is allegations that Defendant Kroll as the president of the police federation makes statements which created influence over the department which ultimately led to the injuries that the plaintiffs suffered. That is not enough to survive this motion to dismiss. Because Defendant Kroll is a private actor, the only way that they would be able to find liability was some sort of civil conspiracy with a meeting of the minds, and that's not alleged here. So because of -- because of the lack of a conspiracy alleged, we're asking that you grant our motion to dismiss.

THE COURT: And, Mr. Kelly, you would agree if I

did that, that that would be without prejudice. In other words, if there was discovery that reflected some sort of -- I'm not sure it needs to be a conspiracy, but whatever it needs to be, we could revisit whether or not new allegations were sufficient. Is that right?

MR. KELLY: Yeah, Your Honor. And frankly, that was kind of the position at this early stage. This is a different story if through discovery they find that -- assuming that Kroll was not named as a defendant in this, and through discovery and depositions they found, well, Kroll was calling us and actually was the one telling us where to shoot and who to shoot because of personal animus or whatever it may be. At that stage, then I think it would be reasonable to allow plaintiff to amend the pleadings to include a necessary party. But at this stage there's not enough -- there's no facts alleged that Kroll was involved in any way, shape, or form with the actions that took place during the riots.

THE COURT: Okay. Well, the Court will have do study this carefully. It's kind of a unique situation. I'll go back and take a careful look at the allegations and the *Magee* case and see what -- okay. I'll take a look at it.

MR. KELLY: Thank you.

THE COURT: All right. You bet. Finally we'll

consider the motion to dismiss the amended complaint that was filed by the State defendants.

MR. WEINER: Good morning, Your Honor. Good afternoon to our east coast colleagues. Joe Weiner on behalf of the State defendants and we move to dismiss the plaintiffs' complaint in its entirety.

As to the State defendants, the amended complaint is long on legal conclusions but lacking in factual allegations; and the allegations are made not only in their official capacity, but the individual capacity against State defendants Harrington and Langer. And those allegations are sparse and insufficient to state a claim. What we see are three specific paragraphs that have allegations regarding them out of 182 in the complaint.

The official capacity claim fails because there's no likelihood of future injury. Both the official and the individual capacity claims fail because there's no factual claim to support a pattern or practice engaged by the State defendants. Qualified immunity would also bar the individual claims against the State defendants because there's no history of a pattern or practice of anything along here. And the only allegation, the only allegation in the entire complaint that would support some type of history, is in a reference to an event on Interstate I-94 in 2016 that was made upon information and belief that is

factually dissimilar from what we have that occurred here.

Finally, the majority of the plaintiffs lack standing because they did not experience any injury from the State defendants in this matter.

As the Court can see, most of the amended complaint are allegations about -- from plaintiffs other than Max Fraden regarding other defendants than the State defendants. There are only three specific allegations about the State defendants. Two of them are jurisdictional, and the other one on paragraph 103 made against Harrington and Langer are made in their official capacity. It's very clear that that's what they are doing.

So for purposes of this motion and for purposes of this case, really what's at issue, it's the incident that occurred on May 30th where plaintiff Max Fraden was near Bobby and Steve's Auto World after curfew. He alleges that somebody fired less lethal munitions without warning. He's not sure if it was one individual, if it was multiple individuals. He's not sure if it was a state patrol individual or if it was an MPD individual or somebody else who did that. There was lots of law enforcement there. And much of the allegations are on information and belief. That's the extent of the allegations, the factual allegations, against the State defendants.

What remains are a number of allegations that the

plaintiffs have identified as municipal allegations which it's an odd term because the state defendant -- the legal framework is different for municipalities as to State defendants. But what it appears to be is pleading a pattern and practice claim that there was a failure to train or failure to supervise by the individual State defendants.

But these complaints or these allegations are largely legal conclusions without any additional factual support. And this is in contrast to where they make allegations as it relates to the Minneapolis Police Department where there are very specific allegations about ordinances, about policy manuals, about policies that they claim were not followed or that are insufficient.

As to the official capacity claim, one thing is clear -- and I think we can all agree on this -- the plaintiffs have identified that they are not seeking damages against the State defendants on the official capacity claim. Indeed they can't under case law.

So the only relief that they are seeking is prospective declaratory or injunctive relief as it relates to the State defendants. And to do that, they have to show that there's a likelihood of future injury; and that likelihood must be imminent, not speculative, and there has to be a real and immediate threat. And in support of that, they have pled exactly one incident in 18 years: the

incident on May 30th involving Max Fraden.

And so the question for the Court in looking at the prospective relief and whether or not this is likely to be repeated, is what sequence of events would need to be shown that there would certainly be a repeat of this incident.

First of all, there would have to be the same level of unrest. And I know that plaintiffs have said that there will be the same level of unrest or there may be the same level of unrest. But what we have, the record in the complaint, is that from 2002 to 2020 there has been exactly one incident where this occurred and it occurred when there was a period of unrest that was unprecedented in the history of Minneapolis. That was unprecedented -- it was after three days of the incident -- of the unrest already occurring.

And what we see is that before that incident there's no allegations that the state patrol had engaged in any type of unconstitutional conduct. And as the plaintiffs point out in their brief, there have been a number of times subsequent to May the 30th where the state patrol has been called up to participate in law enforcement activities for the state and there have not been similar allegations regarding misconduct.

There would need to be a policy of the use of

chemical irritants without warning. And again, the only thing that we have is the one incident that's pled in the complaint. That's all that we're looking at here under the four corners of the complaint. The state patrol would have to be activated, Plaintiff Fraden would have to attend, and there would have to be the use of chemical irritants in spite of him being law abiding. And quite simply that sequence of events is not plausible based on what has been pled in the complaint.

There, as the *Alliance* case indicates, there has to be what the sequence of event is that creates this situation. And here all of these sequences and all these events would have to occur within that chain of event. And what we have is one incident in 18 years that may or may not have even been a state patrol officer; and that does not meet the imminent and immediate threat standard for prospective relief under an official capacity claim.

In terms of the individual capacity claims, Your Honor, the plaintiff it appears is pursuing a failure to train and supervise claim individually against Commissioner Harrington and Colonel Langer. But there's no allegation that Commissioner Harrington or Colonel Langer were personally involved either in the incidents that occurred, everyone agrees to that, but also that they were personally involved in any type of negligent or improper training and

supervision.

And more than that, as I've stated earlier, the complaint itself explicitly as it relates to those municipal allegations, there's a whole heading in the complaint as it relates to that, makes clear that the claims against Harrington and Langer are made in their official capacity. And the Court should hold the plaintiffs to their pleadings in that, like the *Baker* case, that if they plead in their official capacity, it doesn't matter what they put in their caption. What are the allegations in the complaint? And the allegations of the complaint, at least as it relates to the pattern and practice claim, appear to be that these are official capacity claims.

Additionally, the plaintiffs implicitly acknowledge that the pattern and practice allegations in the complaint are not in fact factual. On pages 15 and 16 on their brief, they bullet out the various allegations that relate to the pattern and practice claim. State defendants' failure to supervise and train their employees and agents with respect to Fourth Amendment protected activity amounts to a deliberate indifference to the rights of plaintiff and putative class members. That's one example, and there's a number along those lines.

And they go on to say: "These allegations, coupled with plaintiffs' factual claims of the conduct of

specific officers on May the 30th, show that there's a violation of a constitutional right."

They acknowledge the factual claims that they have in this complaint, very narrow. It's basically paragraphs 90 through 99 as it relates to the State defendants; and the rest of them are legal conclusions that they are trying to use to loop back to create a pattern and practice claim. And that's just simply not what the law is. What is the policy? Is it written? Where are the references to that policy? We see that as it relates to the Minneapolis Police Department. We don't see that otherwise.

And what exactly did Langer and Harrington do? The complaint is absolutely silent as to those two individuals and what it is that they did.

There's also a claim in the briefing that the qualified immunity defense doesn't apply because plaintiffs are seeking declaratory relief, and that's at the bottom of page 16. And I think what that's admitting is that this is essentially an official capacity claim. I don't know, other than damages, what type of relief an individual capacity claim could have against these two individuals because if the issue is we want an injunction to tell Commissioner Harrington and Colonel Langer to do better training or to supervise differently, that's an official capacity claim right there. That isn't an individual capacity claim.

And I think ultimately all of this is clear that the reason that there is no individual claim is that there is no personal involvement. Nothing has been pled, nothing is in the complaint as it relates to Commissioner Harrington and Colonel Langer.

Even if there were a potential individual immunity claim, there would still need to be pleadings that show that those individuals were aware of and failed to correct a pattern of unconstitutional conduct. It's not pled anywhere that they were aware of a pattern. As I stated numerous times, there's no other similar situation that's been identified. And there is no course of training that has been identified with factual specificity as deficient.

Again, it's not whether or not a claim is conceivable. It's whether it's plausible on its face, and that we don't have. The *Krigbaum* case cited in our briefing controls, and plaintiff attempts to distinguish that case on the basis of the fact that it's a summary judgment case, but the summary judgment posture is unimportant. For purposes of qualified immunity, the Court should resolve those issues at the earliest point possible in the litigation. And we see that in the *Payne* case, and it's why State defendants have the opportunity for an interlocutory type of appeal on a qualified immunity type of an issue.

It's not to say that that's what's going on in

this situation. It's just to say that there has to be more. It's not a matter of there needs to be discovery to find this out. It's not a matter of there could be some facts that are alleged out here. It's they are making claims against these individuals in their individual capacity and they need to do more in terms of the pleading to present that to the Court and to be allowed to go forward on that.

There is the argument -- I think those arguments by themselves would dispose of the case as it is. But if any of it were to remain, there's still the fact that the due process claim is duplicative. We identify that in our briefing. The *Gerstein* case is on that and it's essentially duplicative of a First Amendment claim; and if it's duplicative, there's no reason for it to be there and it should be dismissed if anything were to remain.

Finally, there's a standing issue for a number of these plaints. Plaintiff Levy Armstrong, Plaintiff Armstrong, Plaintiff Hempfling and Plaintiff Clark were not injured by the state patrol. And what the plaintiffs are asking is a radical departure from the standing jurisprudence. What they want to say is that these individuals, who were not injured by the named defendants or by any of the defendants identified, State defendants, should be allowed to continue to pursue claims against them. And the only thing they have to support them in that

argument is the case law involving pre-enforcement challenges to statutes and rules.

And that's just simply not -- that's not what this case is about. For statute and rule, there's not an alleged misconduct. The issue is the only way that I can make sure that the statute is not going to apply to me pre-enforcement is to bring a challenge. Here, there is the fact that they already made a claim that the state patrol, at least on one day, engaged in this type of activity.

And the case law is that there needs to be credible threat of prosecution thereunder. It's not threat of prosecution that someone is going to use chemical irritants on somebody. That's why the pre-enforcement challenge case law doesn't apply.

And all of the law on the prospective relief that we're looking at in terms of the official capacity claims refers to whether the conduct will repeat, which of course assumes that there's already an incident that occurred before that conferred standing in the initial incident. So that's what we don't have here.

To use an analogy, I can't sue the Attorney General Bill Barr to enjoin the use of chemical irritants in front of The White House, even though when the pandemic is done I plan on going back to The White House and being there in the square. There may be people who have -- who were

injured and have the ability to state a claim and have standing to do that, but it's not me. I wasn't injured and I can't do it.

It's the same for all of these plaintiffs except for Plaintiff Fraden who has identified specifically the state patrol for some type of injury that he entailed or he incurred.

So, Your Honor, what we have here is one event that may or may not have even involved the state patrol that would have occurred after three days of unprecedented unrest, and that does not make a pattern or practice. That's at the heart of this matter and the amended complaint fails to state a claim upon which relief can be granted. Whether it's in the official capacity, whether it's in the individual capacity, the claim should be dismissed; and also for the reasons of qualified immunity and lack of standing.

And unless the Court has any questions, I'll reserve my time to respond to plaintiffs on this.

THE COURT: Thank you very much.

Who wishes to be heard? Mr. Davis?

MR. DAVIS: It is, Your Honor, and I know we're running up on two hours and so I want to be mindful of the Court's time, but there's a lot to say grace over there that Mr. Weiner addressed and so I need to take those arguments on.

I think we've -- to say as a baseline, I think we fairly addressed much of what he said in our briefs and would rely on those briefs. But just to raise a few points, Your Honor.

First, the State defendants go long, I think, in their brief on this notion that we pled things on information and belief and therefore they are somehow defective on their face and can't support -- can't support our allegations going forward.

And so I just want to be very clear. This case is not like the *Kampschroer* case or the other cases that Mr. Weiner and the State defendants cite specifically because when you look at the allegations of what was pled on information and belief, there's no question that it happened. It was pled on information and belief, for example, because Dr. Fraden wasn't exactly clear who it was who was always firing the less lethal munitions. But it's very clear, it's pled in the complaint, and in fact I think in the *Goyette* case of which this Court can take judicial notice of the complaint, the Minnesota State Patrol has now said that they were firing less lethal munitions and tear gas.

And so those allegations made on information and belief, Dr. Fraden knows that he was out there. He knows that he was kettled and that a group of approximately 150

other individuals were. Dr. Fraden clearly, we have pled, understands that there were a group of them that were together kneeling, some of them in prayer, when they were fired upon. What was pled in information -- on information and belief is that some of the time it was MPD and some of the time it was MSP, Minnesota State Patrol, and that's why it was pled, number one, on information and belief; and number two, why there are specific paragraphs that call out both of them in the alternative. So I just wanted to clear that up.

One thing I do want to point out to the Court and I want to apologize. There was a typo in our brief that cited 2002 -- when it said 2002 and that was supposed to be 2020, and I saw that and it confused me when I saw the State defendants' reply brief and they kept referring to incidents that have taken place over the last 18 years. That cite, and I believe it's at page 9 of our brief, should have been May of 2020.

And the point there, though, is the context is clear from the overall sentence in which what we were pointing out to the Court in terms of this issue of whether there was going to be additional actions is that twice since the events that were complained of in the amended complaint there have been further protests. There have been further incidences and there have been further specific instances in

which the Minnesota State Patrol was called up. That they worked hand in hand, in concert I think as some of the documents say, with MPD, and that there were -- there was kettling that took place.

And so to suggest that the likelihood that this will not happen again and that it's not real and imminent and is perhaps speculative, we would suggest to the Court is just wrong and it ignores the reality of the world in which we live right now and what has happened in 2020.

Since Derek Chauvin was arrested and George Floyd was murdered, those protests took place throughout Minneapolis, throughout the State of Minnesota and the world, and since that time there have been specific -- at least three specific instances we are aware of since the State defendants put their briefs in in which there were further types of protests that at least some of the main plaintiffs here participated in.

It was when one of the counts against another former officer who was there on the scene was dismissed. It happened again when bond was set for that former officer. And as an aside, it happened yet again I think in the fallout in the immediate days after the election just over a month ago.

And so it is absolutely the case that there is a likelihood that this will happen again, especially because

we know that these cases are moving forward. The wrongful death suit is moving forward. The case against Officer Chauvin is moving forward. And we know that there are going to be further issues. We know and have pled that these named plaintiffs and many others intend to protest again, depending on what the outcome of those events are and how things develop. But there's no question that there's a likelihood of it happening again.

There also is no question, Your Honor, that it wasn't just Mr. Fraden who experienced a specific harm or injury by Minnesota State Police. We need to be real clear on this. I think it was Ms. Sarff earlier who said that the Court ought to use its common sense and that the law allows that when assessing these issues.

We're talking about a situation in which hundreds, if not thousands, of individuals were out protesting. Most, the vast majority of them, not all, but most were doing so peacefully. And those individuals that were protesting peacefully recognized and acknowledged that there was a police presence that was there and that they were being deprived of their constitutional rights.

Now, do the Armstrongs and Ms. Hempfling and Ms. Clark specifically allege that during the five-day window they were -- there were projectiles, less lethal munitions that were fired at them by the Minnesota State

Police and they were hit? They don't specifically allege that right now. Do they allege that their desire to participate in their protected First Amendment rights has been chilled by the overall events and effects that happened while they were protesting over that five-day period? Absolutely. Including the presence of the Minnesota State Police.

So to suggest that four of the five named plaintiffs haven't suffered a specific injury because the photographs showing the severe bruising that they got was limited to the projectiles that during that time were fired by MPD ignores the reality of the situation. Just as much as MPD's actions chilled the all five named plaintiffs' desire to exercise their free speech rights, it will happen going forward.

And so we fully believe from a prospective standpoint there is an adequate basis to find standing as to all five of these named plaintiffs.

I do want to take a moment, although Mr. Weiner didn't specifically mention it during his argument, I think one of the cases that they cited in the briefs, I think it's pronounced *Elend*, E-l-e-n-d, it's an Eleventh Circuit case from 2006, and that case was different because we were talking about in that case a one-time visit when President Bush showed up at the University in South Florida and the

plaintiffs had protested and some things happened about which they complained and filed a 1983 action. And the case there wasn't able to go forward in part because there was an issue with saying, Hey, President Bush has no plans to come to the University of South Florida again, and so the -- and if so, it's not going to be any time soon and so the imminence issue here creates a problem. Our facts are very different from that for the reasons that I just set out.

On the issue of official capacity versus individual capacity, I will acknowledge to Your Honor that at least my view is that of all of the issues that Your Honor has before her that you are considering today, that is perhaps the most challenging that we have.

Having said that, part of the reason why there is, number one, so much set forth in the complaint, the amended complaint, about the policies and the practices and the course of conduct for the Minneapolis Police Department but not the Minnesota State Patrol, quite frankly, Your Honor, was because it was what we had access to.

And this is a situation where I would say there's information that is uniquely within the possession, custody and control of the Minnesota State Police Department that we don't have access to. And so to suggest that our pleading is defective because we don't have access to that information I think is inconsistent with what the law

requires at the pleading stage.

One thing that I did not hear in counsel's argument, but that Your Honor raised with others, I do think that to the extent that the Court finds an issue with the individual capacity claims, we find ourselves in a situation where those certainly should be dismissed with prejudice for the reason I just said. Discovery should bear out, and we expect will bear out, our ability to make out those allegations if the Court believes that they are not adequately made out here right now.

On the qualified immunity issue, we heard much of this from the factual issues during the argument on the City defendants, but we think that there's no question that there's a clearly-established rule here. We're talking about a constitutional violation that we believe is clear. And that section that was referenced by counsel earlier, paragraphs 90 through 99, where in exemplary fashion Dr. Fraden sets forth his experience, including the fact that there were folks who were gathered and who were praying and were fired upon, is sufficient to go forward at this stage of the case. It's really not a quantitative issue here so much so as a qualitative one. We think that qualitatively that is sufficient to move forward.

On the issue of procedural due process and the duplicative one -- excuse me -- of the duplicative nature of

the claims, we would -- I'm not sure that we would agree with Mr. Weiner's predicate position, but even if he's right, that doesn't suggest that dismissal was appropriate at this stage of the case. If in fact the belief of the State defendants is that the allegations are completely overlapping, then that would mean, in turn, that discovery is going to be completely overlapping and that there's no additional burden to anyone to go forward.

The law allows us to plead issues in the alternative, even make causes of action that are inconsistent with each other at the pleading stage if we so chose. That's not a reason to dismiss the claims. But in point of fact, we do think that there's a fundamental distinction as pled between the First Amendment claims and Fourteenth Amendment claims that counsel raised.

I didn't hear counsel raise this, but since it's in the brief let me just note this briefly, Your Honor. There is a long body of case law that suggests that deciding issues relating to class certification at this early stage really is -- if not inappropriate, at least it's something that is frowned upon. And so to the extent that the State has argued somehow that these five named plaintiffs are defective or deficient, we would say that it's not time to make that decision and that's not a reason to dismiss our case going forward.

I'll end here just with one point and that is that on the issue of whether individual capacity claims are appropriate for injunctive relief, I'm advised that *Ex Parte Young* expressly confirms that that is appropriate and so that is the basis on which to deny the motion as set forth and argued by Mr. Weiner as well.

So thank you for your accommodation and your time, Your Honor. Unless you have questions, I will cede.

THE COURT: Thank you, Mr. Davis.

MR. DAVIS: Thank you.

THE COURT: Briefly, Mr. Weiner.

MR. WEINER: I promise, Your Honor. I hope less than three minutes.

First of all, in terms of the information, upon information and belief pleading, the one that's really at issue in this case is the one that was made about the 2006 incident, because what's at issue here is was there a pattern or practice and is there a likelihood that this is going to happen again. And one incident does not create a pattern. It simply does not. Possibly two could. I'm not sure that it does, but that's not what we have here. Because the only thing that we have that relates to a potential pattern is the 2016 incident that was filed -- or pled upon information and belief. And again, factually dissimilar based upon the public record as to what occurred

there.

Counsel spoke about the fact that of course we know there's going to be further protests, we know there's going to be further issues. That's not what's at issue here, Your Honor. What's at issue here is whether or not the defendants, the State defendants, are going to unconstitutionally prohibit those by either using less lethal projectiles or chemical irritants or something to that effect. And if anything, the fact that there have been three situations that have already resulted in protests, including some of the people who are plaintiffs in this case, and there has not been a repeat, just goes to show that the plausibility factor that the Court needs to consider just doesn't exist based on the one incident that's been pled here.

In terms of the argument that it's not just Plaintiff Fraden who was affected but all of the plaintiffs because their desire to participate has been chilled, standing requires, quite simply, that there be an injury in fact; that they be injured by the State defendants. And there has not been pled, nor can it be pled, any injury that these other plaintiffs have suffered as a result of any action by the State defendants.

And when we talk about the class certification issue, that's where that really comes into play. Because if

there's no standing, you can't be a class rep, and that's what the State defendant has looked at.

Finally, the qualified immunity situation, we haven't claimed that whether or not some of these things are clearly established protected rights, whether being subject to chemical irritants without a notice of that happening, whether or not that could be something, we haven't argued that that's -- that it doesn't -- it's not a clearly-established right. What we have argued is that it's not clearly established that with one incident that serves as the basis for the complaint, supervisors can be held liable for the actions of the individuals that occurred here for failing to supervise or failing to train. And there have been no allegations in the complaint that it relates to either of those facts.

And for all of those reasons, including what we've already discussed, we respectfully request that the Court dismiss the complaint and thank you very much for your time this morning, Your Honor.

THE COURT: Very good.

MR. DAVIS: Your Honor.

THE COURT: Yes, Mr. Davis.

MR. DAVIS: I apologize. I was advised after I finished speaking that I may have misspoken and said that we believe the claims should be -- if they're dismissed, they

should be dismissed with prejudice. If I said that, obviously I misspoke and I meant without prejudice.

THE COURT: I understood that.

Okay. Very nicely briefed, very interesting issues and beautifully argued, so thank you very much. The Court will take the matters under advisement. Thank you.

MR. DAVIS: Thank you, Your Honor.

MR. KELLY: Thank you, Your Honor.

MS. SARFF: Thank you, Your Honor.

(Court adjourned at 11:36 a.m.)

* * *

I, Carla R. Bebault, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Carla R. Bebault
Carla Bebault, RMR, CRR, FCRR